International Union of Elevator Constructors, Local No. 15, AFL–CIO *and* Northwestern Elevator Company, Inc. and International Union of Operating Engineers, Local No. 139, AFL–CIO. Case 30–CD–142

December 18, 1992

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The charge in this Section 10(k) proceeding was filed on December 24, 1991, by Northwestern Elevator Company, Inc. (the Employer) alleging that International Union of Elevator Constructors, Local No. 15, AFL–CIO (Local 15) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local No. 139, AFL–CIO (Local 139). The hearing was held January 29 and March 12 and 13, 1992, before Hearing Officer Kathleen L. Rupprecht.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Wisconsin corporation with its principal offices located in Milwaukee, Wisconsin, is primarily engaged in elevator construction throughout the State of Wisconsin and the Upper Peninsula of Michigan. During the calendar year ending December 31, 1991, a representative period, the Employer sold and shipped goods and materials valued in excess of $50,000 directly to customers located outside the State of Wisconsin. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Locals 15 and 139 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Oscar J. Boldt Construction Co. (Boldt) is the general contractor on a project for Consolidated Papers, Inc. located near Wisconsin Rapids, Wisconsin. On January 9, 1991,[1] the Employer entered into a subcontract with Boldt to furnish the ''engineering, fabrications, construction and start up of (3) freight elevators'' at the Consolidated Papers site. Elevator construction begins with the drilling of elevator cylinder wells below ground.

Boldt is signatory to a collective-bargaining agreement with Local 139 which both entities interpret as providing for the assignment of all drilling work to Local 139-represented employees on projects covered by the agreement. Local 139 informed Boldt that it would enforce this contractual provision on the Consolidated Papers project.

When the project began, the Employer subcontracted the work of drilling two outside cylinder wells at the site to Layne Northwest which assigned the work to employees represented by Local 139. After Layne Northwest finished this work, Boldt asked the Employer's vice president of field operations, Kenton Rosenberg, whether the Employer also intended to assign the inside drilling work at the project to Local 139-represented employees as required by Boldt's contract with Local 139. Rosenberg responded that the Employer planned to follow its past practice of assigning the inside drilling work at the site to its own employees who are represented by Local 15.[2]

Thereafter, in August, Boldt advised Rosenberg that, pursuant to their subcontract covering the Consolidated Papers jobsite, Boldt would hold the Employer responsible for any labor dispute that arose between Locals 15 and 139 over the inside drilling work. In December, after the Employer had finished the hoist-way for the inside wells, Boldt attempted to pressure the Employer into using a Local 139-represented employee to operate the inside spudding rig. Rosenberg agreed to allow an employee represented by Local 139 to stand by at the jobsite while Local 15-represented employees sank the well. Thereafter, on December 19, Boldt informed Rosenberg that it would supply an experienced employee represented by Local 139 to operate the rig at Boldt's expense, but that the Employer had to assume full responsibility for his work. Rosenberg reluctantly agreed to this proposal on the condition that the Local 139-represented employee was qualified to perform the work.

On December 20, 1991, Rosenberg advised Russ Moldenhauer, Local 15's business representative, that a Local 139-represented employee would operate the spudding rig used to bore the inside cylinder holes at the site. Moldenhauer responded that the drilling involved was Local 15's work and that Local 15 would file a grievance and picket the jobsite if the Employer reassigned the work. On December 23, Local 15 filed a grievance against the Employer claiming for employees it represents the drilling work which had been as-

[1] All dates are in 1991 unless otherwise noted.

[2] Although the Employer has an existing bargaining relationship with Local 139, the unit that Local 139 represents consists of warehouse employees who are not involved in this proceeding.

signed to the employee represented by Local 139. The Employer then filed the instant charge against Local 15 alleging a violation of Section 8(b)(4)(D) of the Act.

In January 1992, Gordon Ostrem, who is represented by Local 139, began to operate the spudding rig at the Consolidated Papers site to drill the inside cylinder wells. Based on its collective-bargaining agreement with Local 15, the Employer assigned a mechanic and a helper to assist Ostrem in the performance of this work. The Employer claimed that Ostrem's progress in drilling the first cylinder well was ''abysmal''; that the hole he initially drilled was not sufficiently plumb and workers had to surround it with concrete in order to correct the problem; that the steel cable used to hoist and drop the drill bit and stem snapped four times because Ostrem failed to operate the rig properly; and that Ostrem, while operating the drill, broke a relatively new bit that cost between $4000 and $5000 to replace.

B. *Work in Dispute*

The work in dispute, as described in the notice of hearing, concerns the ''sinking, drilling or boring of elevator shaft holes, or cylinder wells in connection with the installation of elevators.'' The Employer, however, made a motion at the outset of the hearing to broaden the scope of the disputed work to include all associated assembly and dismantling of the drilling rigs involved in the performance of the work described above. Local 139 protested the motion on grounds of timeliness. The hearing officer granted the motion subject to further review in light of the evidence presented during the hearing. Further, the Employer notes in its brief to the Board that it has purchased the equipment necessary to perform outside drilling work and that it plans in the future to assign such work to its employees who are represented by Local 15. Thus, the Employer contends that the disputed work should encompass both inside and outside drilling work on elevator shaft holes.

Based on our review of the record, we find that assembly and dismantling of the drilling rig is part of the work involved in the drilling of elevator shaft holes. We further conclude that the issue concerning the assignment of this work was fully litigated at the hearing. Therefore, we affirm the hearing officer's ruling to include assembly and dismantling work as part of the work in dispute here. Contrary to the Employer's argument, we shall not make an affirmative award of the drilling work on outside elevators because the evidence here shows that in early 1991 employees represented by Local 139 performed this work without dispute.

C. *Contentions of the Parties*

The Employer argues in its brief that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated based on Local 15's threat to picket the jobsite if the Employer reassigned the disputed work. The Employer claims that the Board should award the disputed work to employees represented by Local 15 based on their collective-bargaining agreement, the Employer's preference and past practice, relative skills and safety, and efficiency and economy of operations. The Employer also has requested that the Board make a broad work award covering its operations in areas where the geographical jurisdiction of Local 15 coincides with the territorial jurisdiction of Local 139.

Local 15's position is generally in agreement with that of the Employer.

In its brief, Local 139 contends that the Board should quash the notice of hearing because the instant proceeding involves nothing more than a contrived effort by the Employer and Local 15 to obtain an assignment of the disputed work for Local 15-represented employees. Local 139 further argues that the Board should adopt the dissenting position of Chairman Stephens in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), and find that Local 139's effort to enforce its subcontracting clause with Boldt does not constitute a competing claim for the disputed work. If the Board finds that a jurisdictional dispute exists in this case, Local 139 asserts that the disputed work should be assigned to employees it represents based on its collective-bargaining agreement with Boldt, the Employer's past practice, area and industry practice, and efficiency and economy of operations.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and (2) there is no agreed-upon method for the voluntary resolution of the dispute.

With respect to (1) above, the evidence shows that Local 15's business representative, Moldenhauer, threatened, inter alia, to picket the jobsite if the Employer reassigned the disputed work to employees represented by Local 139. Although Local 139 has argued that the Employer and Local 15 contrived to create a jurisdictional dispute in order to gain an affirmative work award for Local 15-represented employees, there is no record evidence to support the assertion that the threat to picket was collusive and not genuine. Thus, we conclude that there is reasonable cause to believe that Local 15 used means proscribed by Section 8(b)(4)(ii)(D) to enforce its claim to the work.

We also find that there are competing claims here for the disputed work. In this regard, we rely on the evidence that Local 139 admittedly informed Boldt that it intended to enforce the provision in their collective-bargaining agreement which assertedly covers the

disputed work. Based on the Board's decision in *Slattery Associates*, supra, which we decline to reconsider here, we conclude that Local 139's conduct constituted a claim for the disputed work that supports the finding that a jurisdictional dispute exists.

With respect to (2) above, it is undisputed that there exists no agreed-upon method for the voluntary adjustment of this dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various relevant factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There is no evidence that the Board has certified either Local 15 or Local 139 as the collective-bargaining representative for any of the employees involved in this case. Section 4(a) of the collective-bargaining agreement between the Employer and Local 15 provides that employees represented by Local 15 will perform all work involved in the ''sinking, drilling, boring or digging [of] cylinder wells for hydraulic lifts, hydraulic elevators and screw lifts.'' We find that this provision specifically covers the work in dispute. By contrast, there is no collective-bargaining agreement between the Employer and Local 139 that covers this work.[3]

Accordingly, we find that although the factor of Board certifications does not favor employees represented by either labor organization, the factor of relevant collective-bargaining agreements clearly favors an assignment of the disputed work to employees represented by Local 15.

2. The Employer's preference and past practice

The evidence shows that, except for an isolated situation in which a Local 15-represented employee was sick, the Employer has consistently assigned the inside drilling work in dispute to employees represented by Local 15. Although it is true that the Employer did assign this work on the instant project to an employee represented by Local 139, we note that this work assignment resulted from pressure that Boldt exerted on the Employer so that Boldt would not breach its collective-bargaining agreement with Local 139. It is also clear that the Employer's preference is to continue the assignment of the disputed work to Local 15-represented employees.

For these reasons, we conclude that the factor of the Employer's preference and past practice favor an award of the disputed work to its own employees who are represented by Local 15.

3. Relative skills and safety considerations

The Employer's witnesses testified that, unlike other kinds of wells that are sunk in the construction industry, elevator cylinder wells require extreme precision and accuracy in terms of their plumbness and location. If the elevator well is not perfectly plumb, the installation of the elevator itself cannot be done properly. The evidence also shows that the drilling of elevator wells can be a dangerous undertaking if the operator is not proficient in handling the equipment. For example, serious injury may result if the operator prematurely starts the drill before the helper leaves the hoist-way or if the mast on the inside spudding rig collapses because it is not securely braced and rigged.

The record clearly demonstrates that employees represented by Local 15 have performed the Employer's inside drilling work for many years in a safe and proficient manner. Although Local 139-represented employees have extensive experience in drilling outside wells, it appears that the drilling of inside wells is a different operation in which these employees are less experienced as shown by the uncontradicted testimony regarding Ostrem's travails on the present jobsite. Accordingly, we find that the factors of relative skills and safety considerations tend to favor an award of the disputed work to Local 15-represented employees.

4. Area and industry practices

There is no specific evidence regarding the industry practice for inside drilling work. Regarding area practice, the record shows that in the State of Wisconsin both employees represented by Local 15 and unrepresented employees have performed the inside drilling work in dispute. It appears that the drilling work performed by Local 139-represented employees has been limited to outside wells, such as those they sunk for Layne Northwest in the present case.

Clearly, the evidence is insufficient to establish that industry practice favors either group of employees. Because unrepresented employees, as well as Local 15-represented employees, perform inside drilling work in the relevant geographical area, we find that area prac-

[3] Local 139's contract with Boldt is immaterial to our resolution of this dispute because the Employer controls the assignment of the disputed work under its subcontract with Boldt.

tice is inconclusive and also does not favor an award to either competing group.

5. Efficiency and economy of operations

The Employer's contract with Local 15 requires the Employer to employ both a mechanic and a helper represented by Local 15 when it performs the disputed work. If the Board were to assign such work to employees represented by Local 139, the Employer would have to employ at least one employee, in addition to the two represented by Local 15, to drill inside wells for the elevator shaft. The addition of one employee to the present complement of two Local 15-represented employees to complete this work clearly would increase the Employer's operating expenses. In these circumstances, we find that the factor of efficiency and economy of operations favors an award of the disputed work to employees represented by Local 15.

Conclusions

After considering all the relevant factors, we conclude that employees represented by International Union of Elevator Constructors, Local No. 15, AFL–CIO are entitled to perform the work in dispute as described above. We reach this conclusion based on the Employer's collective-bargaining agreement with Local 15, the Employer's preference and past practice of assigning the disputed work to these employees, relative skills and safety considerations, and efficiency and economy of operations. In making this determination, we are awarding the work in dispute to employees represented by Local 15, but not to that Union or its members.

Scope of the Award

The Employer has requested a broad determination covering its performance of the disputed work wherever Local 15's geographical jurisdiction coincides with the territorial jurisdiction of Local 139. In finding that a broad award is inappropriate here, we stress that the labor organization alleged to have engaged in proscribed conduct is the Union which represents the employees to whom we are awarding the disputed work and to whom the Employer prefers to assign it. The rival claimant, Local 139, is not alleged to have engaged in coercive conduct, nor does the record reveal that it has any intention of doing so. In these circumstances, the Board has declined to make a broad determination. *Iron Workers Local 433 (Crescent Corp.)*, 277 NLRB 670, 675 (1985). Accordingly, our determination here is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Northwestern Elevator Company, Inc., represented by International Union of Elevator Constructors, Local No. 15, AFL–CIO are entitled to perform all the work of sinking, drilling or boring of elevator shaft holes, or cylinder wells, as well as all associated assembly and dismantling work, in connection with the installation of inside elevators at the Consolidated Papers jobsite near Wisconsin Rapids, Wisconsin.

MEMBER OVIATT, concurring.

Unlike the Chairman in his dissent in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), I believe that a jurisdictional dispute exists where, as here, a general contractor, contrary to a lawful union signatory subcontracting clause, contracts the work to a subcontractor whose employees are represented by a union that is different from the one representing the general contractor's employees. That is, the requirements for a jurisdictional dispute are met—there are competing claims to disputed work from rival groups of employees. I would not, however, precisely follow the traditional route in resolving the merits of the dispute. In making the award of work in a jurisdictional dispute, the Board traditionally reviews those factors relevant to the award as they apply to the employer that controls the work in dispute. Thus, where the work is to be performed by a subcontractor, the Board typically would take account of the subcontractor's rather than the general contractor's preference and past practice because the former controls the work in dispute.[1] In my judgment this analysis should not be followed when the general contractor has attempted to cede control of the disputed work in violation of a lawful contract clause.

Different rules should then apply for awarding the disputed work. We should review—with equal weight—the preference and past practice of the general contractor and the subcontractor. Similarly, the certifications and collective-bargaining agreements applicable to the general contractor should be as significant as those applicable to the subcontractor. Thereby, to a reasonable extent, a general contractor will be deterred from attempting to use Board 10(k) awards as—in the Chairman's words—''safe havens for contract breaches.'' With this approach, it will be increasingly likely that employees of the general contractor will receive an award of the work in dispute.

Under my analysis, I find that the factor of collective-bargaining agreements favors an award to neither group of employees. As noted by Member Devaney, Northwestern's contract with Local 15 has a provision covering the work in dispute. But as I view the Boldt contract with Local 139 to be equally relevant and as

[1] See, e.g., *Plumbers Local 2 (Morse Diesel)*, 307 NLRB 644 (1992), and cases cited at fn. 5.

that contract appears to provide that the work in dispute be performed by employees represented by Local 139, I conclude that this factor favors neither group of employees.

I also find that employer preference and past practice favors neither group of employees. Northwestern prefers to use, and has in the past used, employees represented by Local 15. Although Boldt's preference and past practice are not fully clear on the record before us, its efforts to have Northwestern use employees from Local 139 suggests that its preference and past practice favors employees represented by Local 139.

I agree with Member Devaney, for reasons stated by him, that the relative skills and safety considerations favor employees represented by Local 15 and that area and industry practice favors neither group. But I am uncertain that efficiency and economy of operations favors an award to Local 15-represented employees. If the Board awards the work in dispute to employees represented by Local 139, then arguably the Northwestern-Local 15 contract no longer applies. Therefore, in that event, Northwestern would not necessarily have to employ—as Member Devaney suggests—employees represented by both Local 139 and Local 15. Given this uncertainty, I cannot conclude that the factors of efficiency and economy of operations favor either group of employees.

Ultimately, based on the factors of relative skills and safety considerations, I would award the work in dispute to employees represented by Local 15.

CHAIRMAN STEPHENS, dissenting.

For the reasons stated in my dissenting opinion in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 790 (1990), I would not find that Local 139's efforts to enforce its union signatory subcontracting clause with Boldt constituted a competing claim for the disputed work, and I would quash the 10(k) notice of hearing.